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## *July* 18. 1671.

ON a Tryal before the Lord Chief Justice *Hales*; between *Nathaniel* and *John Letten* Plaintiffs, and *Leonar Moresco* Widow Defendant; concerning the Custome of Merchants, in case an Accepted Bill of Exchange be lost; The Question was, Whether the Accepter was bound to pay the Mony on the second Bill; And upon Hearing, by consent of Counsel on both sides, a Verdict was agreed on in these Words.

*VVE find the Custome of Merchants to be, That if the first Bill which is Accepted be lost after Acceptance, and before payment thereof, The Merchant who Accepted such Bill, is bound to pay the Mony upon the second Bill to the Party by the Bill appointed to Receive the same, or to such Person to whom it is by Endorsement appointed to be paid; If the Party who is to Receive the Mony, shall give unto the Party so Accepting sufficient security to save him harmless for such payment, and not otherwise.*

With this Case, as it relates to the Parties, Plaintiffs and Defendant, it is not intended, nor is it any way proper to intermeddle; nor is it possible for any person, without knowledge of the particular circumstances attending it, to give any judgment therein: But because the right stating and determining the general Question, and the Custome of Merchants therein, may be of universal Concern; and because on this Occasion various Discourses have been amongst Merchants themselves, who seem of different judgments and apprehensions thereabout; It is thought necessary to propose the same to the serious and mature consideration of Merchants, and to desire their judgments thereupon, which may serve as a Rule in future, and lead the way to the settlement of other Matters of like nature, now controverted amongst Merchants.

*In order to the Reſolution of the ſaid Queſtion, It hath been obſerved,*

FIrſt, That generally and univerſally all Merchants agree in this, That though the firſt Accepted Bill were loſt, yet that the Party to whom the Money was due ought not to loſe the ſame; and that the Accepter is bound to pay the Money on the ſecond Bill, ſo as he may be ſecured to pay the ſame but once.

Secondly, That concerning the way and manner, whereby the Accepter may be ſecured, the Merchants do not agree amongſt themſelves.

I. Some affirm, That the Party requiring the Money on the ſecond Bill, is bound by the Cuſtome of Merchants to give good ſecurity by Bond in a penal Sum to the Accepter, to ſave him harmleſs againſt his Accepted Bill; and that unleſs ſuch ſecurity be given to the ſatisfaction of the Accepter, the Accepter is not bound to pay the Money.

II. Others affirm, That though it be uſual and oftentimes practiſed by Merchants in ſuch Caſes to give ſecurity one to another, to avoid trouble; yet that there is no ſuch Cuſtome to neceſſitate a Merchant ſo to do, or to debar him of his Right for default thereof: But in ſuch Caſe, The Merchant claiming the Money may bring his Action on the ſecond Bill; and that if on Tryal he prove the Acceptance of the firſt Bill, and his right and propriety to the Money, he ought to have judgment againſt the Accepter for the principal Sum, but not for any coſts of Suit, unleſs the loſs of the Accepted Bill was by the Accepter himſelf; And the Judgment in this Caſe is a Security to the Accepter againſt the Accepted Bill.

III. Others affirm, That the payment of the Money on the ſecond Bill (after the uſual time limited by the Cuſtome of Merchants for payment of Bills) to a perſon to whom the ſame is duely endorſed, and his Receipt and Diſcharge thereon, is of it ſelf, according to the nature of Bills of Exchange, and the Cuſtome of Merchants, a ſufficient diſcharge of, and ſecurity againſt the firſt Accepted Bill.

The Reaſons and Grounds for each of theſe ſeveral Opinions ſeem to be in ſubſtance as follow.

*Thoſe which Aſſert the firſt Opinion alledge*,

Firſt, That they have often known it practiſed, in caſe of the loſs of a firſt Accepted Bill, that ſecurity hath been given to ſave the Accepter harmleſs, and that they never knew it otherwiſe.

Secondly, That the Acceptation is that only which obligeth the Party on whom the Bill is drawn, and that therefore he ought, on payment, to have up his Obligation, or elſe to be well ſecured againſt it.

Thirdly, That if perſons be diſhoneſt, it may fall out, That the firſt accepted Bill may be endorſed to one man, and the ſecond Bill to another man: In which caſe they do conceive, he that hath the Accepted Bill is by preference entitled to the money; ſo that if the Accepter ſhould pay the money on the ſecond Bill, and not have good ſecurity, If afterward the firſt accepted Bill ſhould be found endorſed to another, That perſon would Recover payment by virtue of the ſaid accepted Bill, and ſo the Accepter ſhould be forced to pay the ſame Bill twice, beſides the trouble and vexation of Suits; and that therefore he ought to be ſecured againſt theſe inconveniences before he part with his money.

*Thoſe that are of the ſecond and third Opinions*,

Firſt, They propoſe ſome things to be conſidered in reference to the Cuſtomes of Merchants in general, as

I. That

I. That every Usage or common practice amongst Merchants, doth not amount to the denomination of the Customes of Merchants, so as always to oblige; many things passing between Merchant and Merchant in a way of civility and friendship, by way of accommodation, which cannot therefore presently be called a Custome; as for instance:

It is usual, and the common practice of Merchants, Upon the taking up and delivering of money by exchange, That the party who takes up the money and draws his Bill, doth give his first Bill on the Post-day, and sends for his money on the second Bill a day or two after; Yet no Merchant will say, That this use and common practice is an obliging Custome; But rather the contrary, That it is only a common Civility, and that the party that draws the Bill, may by the true and ancient Custome of Merchants, refuse to deliver any Bill before he receives the money for the value therein expressed.

II. That no one, two, or more particular Merchants, affirming, That they have known such a thing practised in in such a case, and that they never knew it otherwise, is a sufficient ground to determine that practice to be a Custome of Merchants, so as to oblige all Merchants in the course of Exchange thereunto: For though it might be so practised between some, which those particular Men heard of, Yet the same Case might be contested by others, and adjudged after another manner, which they might never hear of.

III. That the Customes of Merchants do not separate between Justice and Equity, *i. e.* in *English*, between Law and Chancery, but both are comprehended, and ought to be considered in the determination of any Matter amongst Merchants touching Bills of Exchange; So that there is no Rule so positive, but that differing circumstances may alter the Case.

There

There are ſome common principles which are taken for foundations, and unalterable, not ſo much becauſe they are received for the Cuſtome of Merchants, as that they are in their own nature juſt and equitable, and carry the reaſon with them, that bears teſtimony to and for them: Such are theſe following:

That every mans word ſhould be as good as his deed.

That every Creditor muſt have a Debtor.

That every one ſhould anſwer for his own Act, or for his own neglect, and that thereby another ſhould not be detrimented.

Theſe and ſuch like are principles upon which all the ſeveral particular Cuſtomes of Merchants are founded, and are inviolably to be obſerved.

But there is no particular Cuſtome, to which a *not otherwiſe* can be ſubjoined, becauſe the circumſtances may vary the Caſe; for inſtance:

It is a received Cuſtome of Merchants, That if there be a neglect of proteſting a Bill within the time limited, That then the Drawer is diſcharged, and the Party claiming the mony ſhall have no Recourſe againſt him for the ſame.

*To explain this Caſe, ſuppoſe*

*Thomas* receives of *Richard* 100 *l.* and gives to *Richard* his Bills of Exchange for the ſame ſum on *William* of *Amſterdam*, payable to *Richard* or his order at 2 Uſance.

This Bill is not paid by *William* at *Amſterdam*, nor proteſted in due time for non payment by *Richard*, or his Aſſigns, Yet *Richard* comes and requires ſatisfaction of *Thomas*.

If the Queſtion be barely and ſingly put to moſt Merchants, Whether *Richard* that paid the value hath Recourſe on *Thomas* the Drawer, in caſe the Bill was not paid by *William* on whom is was drawn, It is probable they will readily anſwer, That *Richard* hath his Recourſe

on

on *Thomas* the Drawer, or that *Thomas* is bound to pay the money to *Richard*, if the Bill were not paid by *William* on whom it was drawn, and a Proteſt made for non payment in due time, and *not otherwiſe*; and that they have often known, that the Drawer was diſcharged, and no way liable, unleſs a Proteſt for non payment were made in due time, without which they never knew that the Drawer was chargeable.

This Anſwer ſeems very plauſible; but let the matter be examined.

*The Caſe is this:*

*Thomas* had no money or effects in the hands of *William*, on whom he drew the Bill, nor was *William* any way indebted to *Thomas*; But *Thomas* having occaſion for mony, takes up this money of *Richard*, and gives him his Bill for the ſame on *William*, hoping he would honour his Bill, and orders him upon payment to Redraw the money on him again; which he promiſeth *William* to pay.

*Richard* by neglect keeps the Bills by him, or ſends them to other places to negotiate, ſo that it happens that the Bill comes not to *Amſterdam*, till the time mentioned in the Bill, and the time limited by the cuſtom of Merchants there, for making the Proteſt, be expired.

When the Bill is preſented to *William*, he returns anſwer (to a Proteſt then made after the limited time) that he will not accept or pay the ſaid Bill.

*Richard* Returns back to *Thomas*, who anſwereth, That the Proteſt was not made in due time, and that therefore he is by the Cuſtom of Merchants diſcharged.

If this ſhould be taken for Good, Then *Richard* would be a Creditor without a Debtor: *William* could not be his Debtor, becauſe he did never accept the Bill; and *Thomas* ſhould not be his Debtor, becauſe the Proteſt was not made in time. Then, *Thomas* would gain 100 *l.* for nothing, and *Richard* would loſe as much. Can this ra-

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tionally consist with justice and good conscience? And if not, No more can it consist with the Custom of Merchants, which is bottom'd on that foundation.

The Case being on Evidence made out to be as above expressed, *Thomas* shall by the Custom of Merchants be obliged to repay the money to *Richard*; and those very Merchants which gave their opinion in the general, with a *not otherwise*, will no doubt on the consideration of these Circumstances subscribe hereunto.

*If the Case have this variation from what is above*,

That *William* was really indebted to *Thomas*,

Then *Thomas* shall not be obliged to pay back, or to answer the money to *Richard*; But onely shall be bound to assign unto *Richard* so much of his Debt owing by *William*, as the said Bill did amount to; It will not be material, whether *William* be solvent or insolvent, for that *Richard* by neglecting to protest in time, hath lost the security of *Thomas*, and so is to take *William* onely for his Debt, whether he be good or bad.

*If the Case have this variation*,

That the Bill of Exchange was accepted by *William*,

Then *Richard* shall have no Recourse at all on *Thomas*; but having *William* obliged by his Acceptance, shall take him only for his Debtor.

And in case of *William's* Insolvency, and that *Thomas* drew the money only on his Credit; *Thomas* may, if he will, repay the money to *Richard*, and take up the Bills, which is esteemed fair dealing; but if he will not, *Richard* hath no right, according to the Custom of Merchants, to enforce him: But in this case *Richard* must come in as a Creditor to *William*, and *Thomas* must be charged as a Debtor to *William*.

Having thus premised these things, concerning the Customs of Merchants in the general,

Secondly,

Secondly, They alledge, That in ſome Caſes, and under ſome Circumſtances, though the Accepted Bill be loſt, yet there may be no need to require ſecurity of the party that demands the money on the ſecond Bill, nor any reaſon for him to give it; and ſo the General Aſſertion before laid down is not to be admitted with a *not otherwiſe*.

I. If the Bill of Exchange be drawn payable to a perſon directly, without any expreſſion of order, as thus:

*AT double Uſance pay this my firſt of Exchange to Mr.* A. B. *five hundred Crowns at* 56 d. per *Crown value, of Mr.* C. D. *and put it to Accompt, as* per *advice of*

*To Mr.* G. H. *Merchant in* London. E. F.

All Merchants will agree, That *A. B.* hath no power according to the Cuſtome of Merchants to Endorſe or Aſſign the ſame to any other; and that if he ſhould take upon him ſo to do, yet ſuch Endorſment is invalid, and the party to whom ſuch Bill is Endorſed cannot have any recourſe upon the Accepter in his own name or right, by virtue of ſuch Endorſement: And that *G. H.* is only liable to pay the money to *A. B.* and to no other; unleſs *C. D.* who paid the value, ſhould before the actual payment countermand the ſame; which not being done, though the firſt Accepted Bill be loſt, it would be altogether needleſs for *G. H.* to require ſecurity of *A. B.* becauſe the payment of the money to *A. B.* and his Receipt doth fully diſcharge *G. H.* the Accepter from that parcel.

II. That the Accepted Bill is not onely loſt, that is to ſay, miſlaid, or out of the way for the preſent, but extinct and deſtroyed, may poſſibly in ſome Caſes, as in deſtruction by Fire or Shipwrack, be certainly known, and ſufficiently evidenced: And if ſo, Then it will be unneceſſary to require ſecurity againſt that which is certainly known not to be.

III. It may fall out ſometimes accidentally; whereof

there is experience, That the Accepted Bill hath been loſt by the perſon that Accepted it, or by his ſervant, and in ſuch Caſe it ſeems unreaſonable, that the patty claiming the money on the ſecond Bill ſhould be forced to give ſecurity.

Thirdly, They ſay, If ſuch a Cuſtome were admitted, That on the loſs of an Accepted Bill the party claiming the money ſhould be remedileſs without firſt giving ſecurity, many inconveniences might enſue.

I. It's probable ſome perſons may not be able to give ſecurity, and yet of ſuch perſons there would be the greateſt reaſon to require it: But that a poor man in ſuch a Caſe ſhould loſe his money, and another enjoy it without any right, would be very unjuſt.

II. It may be conſidered, That a great part of the money remitted by Exchange is for the Accompt of perſons reſiding beyond ſea; and what Factor will be willing to become ſecurity, and procure another alſo to be ſecurity with him, whom he muſt indemnifie, when as he muſt depart with the money preſently, but his Bond lies out againſt him forever. So that in ſuch Caſe the Foreigner will be at a loſs, and hereby the Trade may be diſcouraged and leſſened.

III. May not a perſon out of deſign to gain time, and to keep the money, pretend he hath Accepted a Bill when he never did; and ſo if both Bills cannot be produced, remain with the money? It hath been ſeveral times known, That when money hath been demanded on a Bill not Accepted, Anſwer hath been made on the Proteſt, by the party on whom the Bill was drawn, That he had Accepted the other Bill; when as in ſome time after both Bills have been produced, and neither of them Accepted: Now if the other Bill had miſcarried, the falſity could not have been detected.

IV. The Accepter on this pretext, to gain time and keep

keep the money, may be over curious and diſlike the ſecurity tendred: And if it be anſwered to this, That then the party may bring his Action, and the Court will judge of the ſecurity; It may be conſidered, 1. That this will be a means to beget Suits, inſtead of preventing them: 2. That it may deter men from offering themſelves as ſecurity, leſt they ſhould thereby come to have their Credits queſtioned in a publick Court, and ſo render it more difficult to obtain ſecurity: 3. It would be a double charge if the ſecurity were not approved, or allowed of.

Fourthly, They ſay, The only reaſon of requiring ſecurity is to indemnifie the party that pays the money on the Bill, that he be not charged twice for the ſame parcel, but that he be aſſured that he pays the money to the right party: This they conceive is done by a Tryal at Law, and a Judgment thereupon; becauſe on Tryal the Court will examin all Circumſtances, and the party claiming the money muſt prove his right and propriety.

*Obj.* Suppoſe the Bill of Exchange be made payable to *A. B.* or his order, and that *A. B.* hath Endorſed the Accepted Bill to *L. M.* and the other Bill not Accepted to *J. K.* and taken a value of each of them; Shall not *L. M.* having the Accepted Bill recover payment of *G. H.* notwithſtanding his former payment to *J. K.* on the other Bill unaccepted, or any Judgment had thereupon; it being a Rule in the courſe of Exchange, That it is onely the Acceptance of the Bill that obliged *G. H.* on whom it was drawn to the payment, and that Endorſements of Bills amongſt Merchants doth transfer Property?

*Anſw.* It is anſwered, That the payment of one of the Bills to *J. K.* in caſe the ſaid Bill was duely endorſed by *A. B.* to him, and paid at or after the due term, limited by the Cuſtome of Merchants for payment of Bills of Exchange, was a good payment of that parcel, and a due diſcharge to the Accepter of his Acceptance, and ought to be accepted as a good Plea in Barr, to any Action brought by *L. M.* on the Accepted Bill againſt *G. H.* the Accepter, or *E. F.* the Drawer; if there have been a Judgment in the Caſe, That hath determined the Endorſement to be duely made, and ſo there will need no other matter to be examined but the payment.

For the clearing this matter, upon which the main difficulty depends; It muſt be conſidered,

Firſt, That though there be two or three Bills given, *viz.* firſt, ſecond, and third, Yet they are all to be underſtood to be but one parcel, and the giving of ſeveral Bills, is intended to ſupply the Inconveniences that might happen by the miſcarriage of the Poſt or other accident, and therefore to Parts not far remote, as to *France*, *Holland*, *&c.* there is uſually given but two Bills, firſt and ſecond; and to Parts more remote, as to *Venice*, *Italy*, *&c.* there is given three Bills, firſt, ſecond and third.

Secondly, That the tenor of every Bill of Exchange is conditional, to pay the one, the other not being paid: This Condition is always expreſſed in the ſecond Bill, and ſometimes in the firſt; however it is always implyed, for a firſt denotes there is a ſecond, and amongſt Merchants it is always ſo underſtood; and therefore when they give but one Bill, it is uſually expreſſed, *Pay this my ſole (or my onely) Bill.*

Thirdly, That the Acceptance of one Bill, doth oblige the Accepter to the payment of the parcel, and is not, nor ought to be reſtrained to the particular Bill underwritten, or to any particular perſon to whom the ſame is Endorſed, but is underſtood generally of the parcel, and to pay the ſame to ſuch perſon as at the time of the falling due of the Bill (according to the Cuſtome of Merchants) ſhall have right to demand and receive the ſame.

That the Acceptance is not reſtrained to the Bill underwritten, but is to be extended to the Parcel, which takes in all the Bills: It is ſuppoſed no Merchant, acquainted with the Trade and Courſe of Exchange, will deny: Yet if any ſhall ſay, That the Accepter is ſtrictly obliged to the Bill underwritten, and not to the Parcel generally; and that upon the Acceptance of one Bill the other are rendred invalid, and become onely Scrolls; They are deſired to conſider,

I. Whether this be not contrary to the very deſign and end of giving two Bills, which is to prevent the Inconvenience may happen by the loſs of one.

II. Whether this would not in a great meaſure cut off the Trade and Accommodations of Merchants in the Trade of Exchange. Bills are ſent for Acceptance, and then tranſmitted to other places to negotiate: But who would dare to adventure an Accepted Bill, if the miſcarriage thereof ſhould be the loſs of the money.

That the Acceptance cannot be reſtrained to any particular perſon, to whom the ſame is payable or Endorſed, is evident; Becauſe, according to the Cuſtome of Merchants, the perſon that paid the value hath

hath power of Countermanding the payment, at any time before it be due and actually paid, or duely Endorſed to another; and in caſe of Endorſements, it is the ſame ſtill, for he that paid the value on the laſt Endorſement hath the power of Revocation: Hence it is, that it is ſo unſafe for a Merchant to pay a Bill before it be due; becauſe if he that paid the value doth ſignifie a countermand before the Bill be due, and make out his title to the money, he that paid the Bill before due, ſhall be adjudged to have paid it in his own wrong, and be obliged to pay it again, notwithſtanding he had his Accepted Bill delivered him up by the other.

Fourthly, That the Acceptance of a Bill, is always to be underſtood according to the nature and tenor of Bills of Exchange, and the Condition therein expreſſed or implyed, *viz.* to pay one, the other not paid, and ſo the Obligation by the Acceptance is to the parcel, and not to any of the Bills diſtinctly and ſeparately, but conditionally: So that *G. H.* having paid *J. K.* may truly and juſtly anſwer to *L. M.* demanding by his underwritten Bill, That he hath performed what his Obligation by his Acceptance obliged him to, *viz.* to pay the parcel, *i. e.* one Bill, the other not being paid: And this Plea in this Caſe, is the ſame in effect, and ought to be ſo taken, as that of Conditions performed to a Bond in the Courſe of our Law, is.

Fifthly, Though Endorſements of Bills of Exchange do amongſt Merchants transfer Property, Yet there is no rule of preference, ſo as poſitively to determine the Right to be in one and not in the other: In the Caſe alledged,

I. Suppoſe *L. M.* with the Accepted Bill endorſed to him, and *J. K.* with the other Bill Endorſed to him, come both together at the time of payment to demand the money of *G. H.* It is ſuppoſed there is no Cuſtome of Merchants obliging him to pay this and not that, but that it is in the choice of *G. H.* to pay which of them he pleaſeth; though it may be beſt for him to prevent trouble to pay neither, and to keep the money till the matter be determined, which in foreign Parts would be in a day or two by the Court Conſulate, but in *England* if he be ſued, he may pay the money into Chancery, and thereby be diſcharged, and leave the two Competitors to try their Title. If he reſolves to pay one, it will be readily granted, that in prudence he will chuſe to pay him that hath the Accepted Bill, thereby to take up his firm.

II. Suppoſe as this Caſe is, That the firſt Bill Accepted doth not appear at the time limited for payment, but onely the ſecond Bill Endorſed by *A. B.* to *J. K.* In this Caſe there cannot be a preference, becauſe

becauſe there appears but one Claimer: That which our Law in ſome Caſes gives a Right by way of preference, *viz.* The time of Aſſignment, as in Mortgages the firſt takes place, will not here be material, the doubt being about the Acceptance, and not about the time of the Endorſement. Oftentimes there is no Dates put to the Endorſements on Bills of Exchange: and when there is, It may fall out that the firſt Accepted Bill may be Endorſed after the ſecond.

*Obj* It is further Objected, That *L. M.* who paid his money to *A. B.* upon the Endorſement of the firſt Accepted Bill to him, might not do it on the Credit of *A. B.* the Endorſer, nor on the Credit of *E. F.* the Drawer, but on the Credit of *G. H.* and his Acceptance; and that he would not have truſted *A. B.* but depended on *G. H.* the Accepter: Whereas *J. K.* who took the Endorſement of *A. B.* on the ſecond Bill, muſt needs be underſtood purely to truſt *A. B.* in the Caſe: And it's probable, that *L. M.* in confidence of the ſolvability of *G. H.* the Accepter, might not ſend for the money at the time, knowing the Accepter to be always liable: And if in the mean time *G. H.* ſhould pay the money to *J. K.* on the ſecond Bill, and that thereby *L. M.* ſhould be debarred of any Recourſe againſt *G. H.* the Accepter, he ſhould be remedileſs, not having proteſted in time; Which would barr all Civility, and alſo obſtruct the Trade, by hindering the Negotiating of Bills of Exchange.

*Anſw.* This Objection is founded on Suppoſitions and Irregularities, and ſeems to be the Language of a Goldſmith Banker, and not of a knowing Merchant: For the clearing the ſame,

Firſt, It is to be conſidered, That of late years there are two kinds or ſorts of Negotiating Bills of Exchange; one very ancient between Merchant and Merchant in the Courſe of Exchange, whereby a Bill on *Amſterdam* is made uſe of at *Paris*, *&c.* one and the ſame Bill by ſeveral Endorſements ſupplying ſeveral mens occaſions in diſtinct places: The other very novel in *England*, between the Goldſmith Banker and the Merchant or Factor; The Goldſmith by way of diſcount advancing the money, and the other aſſigning him the Bill.

Secondly, That it ſhould be a Rule to every man in the Courſe of Exchange, to take care that he delivers his money to a ſufficient reſponſible perſon: Whereas the firſt ſuppoſition in the Objection is, That *L. M.* paid his money to *A. B.* on the Credit of *G. H.* the Accepter, and not on the Credit of *A. B.* the Endorſer, *&c.* It is anſwered, That *J. K.* might pretend alſo, that he paid his money on the Credit of *E. F.* the Drawer, and not on the Credit of *A. B.* the Endorſer; and the Conſequences would be as fatal to *J. K.* if the Accepted Bill were

were paid to *L. M.* for that he could never have recourſe on *E. F.* the Drawer, but only on *A. B.* the Endorſer; and the like recourſe may *L. M.* have, though the Proteſt were not made in time. *L. M.* ſhould have taken care to whom he delivered his money, and if he look'd on the Accepter only, he therein acted irregularly, and the ſame ought not to be any Argument on his behalf.

If it be ſeriouſly examined, it will appear, That many, if not moſt of the Frauds and Abuſes touching Bills of Exchange have riſen, or been occaſion'd from this irregular proceeding, in not obſerving the Rule abovementioned.

Whence is it, That ſome perſons, when their Credit is low, that they cannot take up money by Exchange, do pretend to deliver money by Exchange, and cauſing the Bills to be made payable to them or Order, Negotiate the firſt Bills (which are delivered on the Poſt-day) on the Credit of the Drawer, and thereupon receive the mony, and preſently abſent themſelves, and never pay the value to the Drawer.

Whence is it, That ſome Factors (deſigning to make an advantage by Failure) having Bills ſent them to receive for other mens Accompts, do negotiate, or rather diſcount the Bills with Goldſmith-Bankers, and thereby defeat their Principals; But from this, That the Bankers (who make great advantage on ſuch occaſions) reſt and rely on the ſufficiency of the Drawer or Accepter.

And thus, upon this Suppoſition, it comes to paſs, That ſome perſons (who are or would be reputed honeſt men) do for gain become aſſiſtant, and helpful to others to carry on unjuſt and fraudulent deſigns.

It is true, That Bills of Exchange made payable to ſuch a perſon or order, being Endorſed by him for a value received, ought to have their Courſe, and in ſuch Caſe the Goldſmith Banker will ſay, The Merchant ought to have taken care whom he entruſted.

And may it not with as much and more reaſon be ſaid to the Bankers in the preſent Caſe, They ſhould have taken care whom they entruſted and delivered their money to?

Thirdly, That in matters of Exchange all punctuality ought to be obſerved, as well in demanding the money on a Bill, as in paying it: It is acknowledged, that the Accepter is always bound for the parcel until payment: But if any will forbear or neglect to ſend for his money in the proper time, ſuch neglect ought not to be to the prejudice of any but himſelf.

A Maſter of a Ship firms three Bills of Lading for a Bag of 500 Pieces

Pieces of Eight, received at *Cadiz* from *William*, to be delivered at *London* to him or his Order: The Master keeps one Bill, *William* keeps the other two; One of which he assigns to *Richard*, for the value of him; The other he assigns to *Thomas*, for the value of him. The Ship arrives at *London*: *Richard* forbears or neglects for some days to send for the Bag of money: In the mean time, *Thomas* sends his Bill of Lading, receives the Bag of money, and delivers up the Bill of Lading with a Receipt thereon. Shall *Richard* in this Case have any other recourse than against *William*, who dealt unjustly in assigning one parcel to two persons; and he cannot blame the Master for delivering the money to *Thomas*, but himself for not sending for it sooner.

So in the present Case, *L. M* hath no reason to blame *G. H.* for paying the money to *J. K.* but rather to blame himself for not sending for it sooner.

Fourthly, To that Supposition in the Objection, That this would obstruct Trade, by hindering the Negotiating of Bills of Exchange; It may be Answered from what is before alledged, That the fraudulent and unjust Negotiation of Bills, by insolvent persons, may in some measure be thereby prevented: But the Mercantile and true Negotiating of Bills of Exchange, by persons of Credit, will be advanced, and the Honour of the Trade of Exchange preserved.

It is a Principle taken for granted in the Course of the Trade of Exchange, That all Merchants Trading in Exchange, are (or ought to be) persons of Credit, able to draw by Exchange, and therefore the dammages recoverable in Case of Protest for non payment, according to the Custome of Merchants, is onely the common Charges of the Protest, Commission and Port of Letters, and the Rechange, that is, the difference of price between the Redrawing and the Remittance. And nothing can ever advance the Trade of Exchange, or uphold the Honour of it, unless it be managed by persons of Credit and Reputation.

The Objecter would introduce a new Principle, and takes it for granted, That Bills of Exchange are Negotiated by persons of no Credit or Estates, such as he dares not trust of themselves: And that he might continue to deal with (*i. e.* to fleece) these securely, is the Ground of his Objection, and the Trade he fears would be obstructed.

## *The Reſult upon the Whole.*

FRom theſe ſeveral Diſcourſes and Argumentations there may ariſe a Determination of Two Queſtions.

Firſt, What Courſe ſhould be taken, in Caſe an Accepted Bill be loſt?

*This ſeems to be Reſolved thus:*

I. That the Accepter by virtue of his Acceptance, underwritten on one Bill, is bound to ſatisfie the parcel, that is to ſay, one Bill or the other; or if one miſcarry, then the other.

II. That if the Accepted Bill were loſt by the Accepter himſelf or his Servant, then he ought to pay the money on the other Bill without requiring ſecurity.

III. That though the Accepted Bill were not loſt by the Accepter or his Servant, Yet if the Bill were payable to ſuch a perſon, and not to him or his order, and no countermand ſignified to him, The Accepter might with ſafety pay the money to him on the ſecond Bill, without any other ſecurity than a diſcharge for the ſame.

IV. That if the Bill were payable to Order, The Accepter on payment of the money on the other Bill, might require ſecurity to indemnifie him from the Accepted Bill, or any trouble and charge ariſing by reaſon thereof; which, if it can be complied with, is a good way of Accommodation, and hath been often practiced.

V. The not giving ſecurity in this Caſe, ought not to render the Accepter Unactionable, or deſtroy the Right of the party claiming the money by the other Bill.

VI. That the Accepter paying the money to a perſon to whom the other Bill was rightly Endorſed, after the time limited by Cuſtome for payment, and having up the ſaid Bill, and a diſcharge thereon, ought not to be further chargeable by the Bill on which the Acceptance was underwritten.

VII. That the Accepter if he be not contented to pay the money on the other Bill, and that the Demandant and he cannot agree thereabout, Yet the Accepter, if he be a Merchant of Repute and Credit, and without ſiniſter deſigns, will maintain the Honour of Exchange, and be ready, as he ought, (were there a Court Merchant in *England*) to pay the money into the Court; Which ſhould be his ſecurity for that parcel againſt all Claimers: Whether this is practicable in the Courſe of the Common Law, Learned Counſel muſt direct. However, if the Accepter be ſued at the Common Law, he may addreſs to Chancery, pay the money into that Court, and take the Indempnity thereof.

Secondly, What Courſe is to be taken when one parcel is really transferred to two perſons; The Accepted Bill to one, The other Bill to another?

*This ſeems to be thus Reſolved:*

I. When there appears but one of the Bills at the time limited for payment, the payment thereof ought to diſcharge the Accepter of the parcel, that is to ſay, of the other Bill or Bills. This Caſe will be the ſame in ſubſtance with the other Queſtion; there it is in ſuppoſition, here in reality; therefore the Reſolves to that may be applicable to this.

II. When both Bills appear at the time of payment, It is in the Accepter his choice to pay either of them, there being no poſitive Cuſtome of Merchants that gives Right by preference.

III. That though it be in his choice to pay either, Yet it will be moſt adviſable (if he pay any) to pay the Accepted Bill, that ſo he may take up his firm.

IV. That it is beſt in that Caſe for the Accepter to pay neither, but to pay the money into Court, as is propoſed in the ſeventh Reſolve on the former Queſtion.

V. That in this Caſe it may be equal, and preyent trou-

ble

ble and Charges, for the two Demandants to agree, and jointly to bear the hazard or loſs.

VI. That where they cannot agree, and that the whole mony is paid and adjudged to one, the other ought to have his Recourſe only againſt the Endorſer, who is obliged to make good, not only the Principal, but all Charges and Dammages: And that in this Caſe, the time of the Proteſt will not be material, the Redemand of the money not being for any failure of the Party on whom it was drawn.

## *Of the Time of the falling due of Foreign Bills of Exchange.*

MAny Diſputes have of late years ariſen amongſt Merchants, concerning the time of the falling due of Bills of Exchange; which is a matter of great moment, in order to the making of Proteſt in the due and limited time: For when on the one hand, ſome apprehend Bills to be due ſooner, by over diligence, diſcontents, animoſities and quarrels are occaſioned amongſt Merchants; and on the other hand, while others take them to be due later, by neglect, they run into hazards and inconveniences: Therefore it would be requiſite, and a very neceſſary Work, ſo to ſettle this by a Univerſal Concurrence of Merchants, that in future all Quarrels and Diſputes herein might be prevented.

In order to which, upon this occaſion, That which hath been obſerved of the difficulties and differences concerning this particular, is alſo humbly offered to the Conſideration of Merchants.

Theſe difficulties for the moſt part do ariſe from the difference between the New and Old Stile, and the inequality of the Months of the Kalendar, ſome Months having 31 days, ſome but 30, and *February* but 28, except in the Leap-year.

*The First Case.*

Bills of Exchange are drawn from *Paris*, payable in *London* at 2 Uſance, and bear Date, the *6 December*, *6 January*, *6 March*, *6 July*, *6 Auguſt*: To find out when theſe Bills are due in *London*,

Firſt, Some do examin when they would have been due in Foreign Parts, reckoning the 2 Uſances from the Date, and then ſubſtracting the 10 days for the difference of the Stile; as thus, 2 Uſances from the *6 December* is the *6 Feb.* the *6 February* New Stile is the 27 *January* Old Stile; and ſo they make the Bills above to fall due in *London*, the 27 *January*, 24 *February*, 26 *April*, 27 *Auguſt*, 26 *October*.

For reaſon of this their way and opinion, They alledge, That the Bills being made in *France*, the 2 Uſances ought to be accounted according to the Computation in *France*.

Secondly, Others do examin what the true Date of the Bill is according to the *Engliſh* Accompt, and ſubſtracting the 10 days for the difference of the Stile from the Date, they then reckon the 2 Uſances, as thus, The *6 December* New Stile is the 26 *November* Old Stile, 2 Uſances from the 26 *November* is the 26 *January*; and accordingly they account the Bills before mentioned to fall due, the 26 *January*, 27 *February*, 24 *April*, 26 *Auguſt*, 27 *October*.

To evidence this manner of Reckoning to be the true and right way, and that the other is not proper, nor ought to be ſettled, it is alledged,

Firſt, That the Command or Direction by the Bill of Exchange is to the Merchant in *London*, to pay ſuch a ſum in *London* at 2 Uſance, which doth neceſſarily imply 2 months to be accounted in *London* from the Date: Though the Bill be made in *France*, yet its reference is to the Merchant in *London*, who is to pay it there at ſuch a time.

If the 2 Uſances ſhould be calculated according to the Accompt in *France*, it would fall out, That ſometimes there would want in *London* 3 days of 2 months, as in the

Bill

Bill Dated the 6 *January*, and at another time there would be 2 days more than 2 months, as on the Bill Dated the 6 *March*; whereas the Merchant in *London* ought to have 2 months time for the payment of his money; which calculating according to the ſecond Opinion he would always have.

Secondly, If the firſt manner of Accompting were allowed, it would fall out, when both Stiles are put to ſome Bills of Exchange, and but one Stile to others, though all from one place, and of one day, That there would be two or three days difference between the falling due of the one and of the other; as ſuppoſe one Bill Dated at *Paris* the $\left\{\begin{matrix} 6\ January. \\ 27\ December. \end{matrix}\right\}$ All Merchants will conclude (the real Date according to both Stiles being thus expreſſed) That this Bill would fall due the 27 *February*. Whereas another Bill Dated at *Paris* the 6 *January*, if the 2 Uſance be reckoned as in *France*, and then the 10 days ſubſtracted, that Bill would fall due the 24 *February*.

Now that both theſe Bills being Dated on the ſame day at the ſame place, payable at the like Uſances, ſhould not fall due on one and the ſame day in *London*, would be very incongruous and unreaſonable.

It is true, That according to this Rule, It will fall out (in regard of the difference of the month of *February*) That ſome Bills that vary 2, 3, or 4 days in their Date, will fall due on one and the ſame day: Bills Dated at *Rouen* the 7, 8, 9, and 10 *January*, will all fall due in *London* the laſt of *February*: The 7 *January* New Stile is the 28 *December* Old Stile, and 2 Uſances from the 28 *December* is the 28, that is (except in the Leap year) the laſt of *February*: The 8, 9, and 10 *January* New Stile is the 29, 30, and 31 *December* Old Stile, and to reckon 2 Uſances from the 29, 30, and 31 of *December*, would be the 29, 30, and 31 *February*, if *February* had ſo many days;

days; but becauſe that month hath but 28, or at moſt but 29 days, they muſt all fall due the laſt of *February*. And whereas ſome would account the two firſt of thoſe Bills to be due the 26 and 27 *February*, The ſame would be inconſiſtent with the General and Univerſal Received Cuſtome, That every Uſance is to be taken for a month as it falls in the Kalendar; and as to go beyond the month would be an addition, ſo not to go to the extent of it, would be a diminution of the 2 Uſances; according to the Proverb, *Where it is not to be had, the King muſt loſe his Right:* So where the days cannot be found in the month, there they muſt be content with what there is. But it doth not from hence follow, that any ſhall loſe or abate of his Right where it may be had, and no more doth it in this Caſe; and therefore they ought to reckon as far as the month will bear. If any ſhall ſay, That the 29 *December* wants 2 days of the end of that month, and that therefore the Bill muſt fall due 2 days before the end of the ſecond month following; It is a Method not known or practiſed amongſt Merchants, and would occaſion new Diſputes never heard of: For by the ſame reaſon it may be pretended, That a Bill Dated in *Rouen* the 28 *February*, ſhall not be due in *London* till the 20 *April*, becauſe that day is 10 days before the end of the month, as the 18 *February* was, on which the Bill was Dated.

Thirdly, That this latter way of Accompting, according as the months fall out in *England*, from the true Date of the Bill, was the ancient practice, and the other way never inſiſted on till within theſe 30 years laſt paſt; as alſo that in *France* and other Parts, on Bills from *England*, they firſt find out the true Date, and then reckon the 2 Uſances: As for inſtance: A Bill Dated at *London* the 26 *December*, at 2 Uſance, will be accounted due at *Rouen* the 5 *March*, thus, the 26 *December* Old Stile is the 5 *January* New Stile, and 2 Uſances from the 5 *January* is the 5 *March*; where-

as

as if they accounted according to the other way, it would be thus, 2 Uſances from the 26 *December* is the 26 *February*, and the 26 *February* Old Stile is the 8 *March* New Stile: So the Bill ſhould not be due at *Rouen* till the 8 *March*, whereas in truth, according to the practice there, it is due the 5 *March*: Alſo Bills Dated in *London* the 18, 19, 20, and 21 *December*, at 2 Uſance, are accounted due at *Rouen* the laſt of *February*. And thus much hath been lately certified from the ſaid place.

Many perſons, becauſe of the Diſputes about the way of accounting the time, do calculate both ways, ſometimes one way, ſometimes the other, according as they find their intereſt and advantage, which occaſions much inconvenience and diſorder; and therefore it is propoſed, That the latter way of accounting before-mentioned ought to be only practiſed, as being moſt reaſonable, moſt certain, and the truly ancient Cuſtome and Practice.

*Second Caſe.*

Bills of Exchange are drawn from *Paris*, payable in *London* at 2 Uſance, and bear Date the 10 *March*, 10 *July*, 10 *December*.

Some do calculate theſe Bills thus: The 10 *March* is the 28 *February*, 2 months from the 28 *February* is the 28 *April*; and ſo they make theſe Bills to fall due the 28 *April*, 30 *Auguſt*, 30 *January*.

But others affirm, That theſe Bills ought to be calculated after this manner, *viz.* The 10 *March* is the laſt of *February*, 2 Uſances from the laſt of *February* is the laſt of *April*; and accordingly they are due the 30 *April*, 31 *Auguſt* 31 *January*, and not before.

For reaſon hereof they ſay, It is by Univerſal Cuſtome and Practice amongſt Merchants acknowledged, That Uſance from *France* is one month, according as the months are in the Kalendar, and that the difference between Old Stile and New Stile is 10 days; ſo that always the

the 10*th* of one month New Stile is the laſt of the former month Old Stile, and a Bill being Dated the laſt of one month they muſt reckon to the laſt of the two months following, or elſe they do not allow two full Kalendar months for the 2 Uſances, which undeniably ought to be done.

*Obj.* It is Objected, That if ſo, then it would fall out, that two Bills which differed but one day in their Date, ſhould differ three days in the time of their falling due; as ſuppoſe one Bill Dated the 9 *March*, that would fall due the 27 *April*, and another Bill Dated the 10 *March* ſhould not fall due till the 30 *April*.

*Anſw.* It is Anſwered,

Firſt, That where Bills are of one and the ſame Date and Time, there it would be incongruous and unreaſonable if they ſhould not fall due on the ſame day: But where there is a difference in the Date, though but of a day, there is not the like Reaſon, becauſe of the inequality of the months, which are to be taken as they fall.

Secondly, This Objection may be retorted; for ſuppoſe two Bills were Dated, one on the 10 *March*, the other on the 11 *March*, according to their manner of accounting, the one would be due the 28 *April*, and the other not till the 1 *May*; ſo that there would be the like difference: Whereby it is evident, That this Objection is of no weight or conſideration.

*Third Caſe.*

Bills of Exchange Dated in *Paris* and payable in *London*, are not made at Uſance or double Uſance, according to the ordinary courſe, but after this manner, *viz.*

*Au quinçieme du mois prochain payez.*
On the 15 of the next month pay, *&c.*

*Au quinçieme de* May *prochain payez.*
On the 15 of *May* next pay, *&c.*

*Per*

*Per tout le mois d'* Aouſt *payez.*
In all the month of *Auguſt* pay, *&c.*

*Au fin du mois prochain payez.*
On the laſt of the next month pay, *&c.*

*Au fin d'* Aouſt *prochain payez.*
On the laſt of *Auguſt* next pay, *&c.*

The Stile not being inſerted, the Queſtion on ſuch Bills is according to what Stile thoſe expreſſions ſhall be taken.

Some would have to be reckoned according to the Foreign Stile, alledging, That the Drawer at *Paris* ſpeaks the Language of that place, when by his Bill he ſaith, *On the* 15 *of the next month pay*; and ſo the Bills above-mentioned ſhould be due the 5 of the next month, the 5 of *May*, the 21 of *Auguſt*, the 20 or 21 of the next month, according as it hath 30 or 31 days, and the 21 of *Auguſt* next.

Others do affirm, That ſuch expreſſions are to be underſtood and taken according to the Stile in the place where the Bills are payable; for though the Drawer make the Bills in *Paris*, yet by his Bill he ſpeaks to one in *London*, at *London*; and till the Bill come to *London* to the Party on whom it is drawn, it may be ſaid to be ſilent, but then being preſented to him for Acceptance or Payment, it ſpeaks with authority, and muſt be anſwered, either with a refuſal, or elſe with compliance. So that what conſtruction would be made of a *Pariſians* Word or Order, if he were in perſon at *London*, and ſhould ſay to his Factor, *On the* 15 *of the next month pay, &c.* the ſame ought to be made of the like expreſſion in his Bill; and accordingly ſuch Bills are, and ought to be accounted due and payable on the 15 of the next month, the 15 of *May*,

the 31 of *August*, the last of the next month, and the 31 of *August* next.

This last way of reckoning when such Bills are due, according to the Stile where the Bills are payable, is conceived most agreeable to Reason and the Nature of Exchange, and ought to be the onely Method and Rule in such Cases. However it were better that persons would always take care, that the Stile, according to which such expressions are by them intended, should be inserted in the Bills, which would prevent all inconvenience: And if they neglect so to do, they must onely blame themselves if it answer not to their apprehensions and occasions.

*The following Rules were in former times by all generally received as the Custome of Merchants.*

First, That Usance, whether it be one month or three months, according to the Custome of the Place where the Bill is drawn, The months are always to be accounted according to the Kalendar, whether the months contain in them more or less days.

Secondly, That these Usances are to be accounted from the true and real Date of the Bills, according to the Stile and reckoning of the place where the Bills are payable.

Thirdly, That New Stile being always 10 days before Old Stile, it must always be, that the 10*th* of one month New Stile is the last of the former Old Stile; and that Usance being a full month, it must extend from the last of one month to the last of the next, *&c.*

Fourthly, That for all Bills payable at a certain day or time, mentioned in the Bill of Exchange it self, if there be no declaration in the Bill what Stile is thereby intended, it ought to be understood according to the Stile of the place where the Bill is to be paid.

By

By these Rules, as being the Custome of Merchants in *London*, it is conceived, That all Questions touching the falling due of Foreign Bills of Exchange, may and ought to be determined.

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*FINIS.*

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*Sir*,

YOu are desired seriously to peruse and examine the Matters contained in this Paper, and to return your Thoughts thereupon in Writing, wherein you agree, and wherein you differ, with the Reason thereof; and what else you have observed of the Custome of Merchants therein. Dated this 18 of August, 1671.

To Mr.

Merchant

in *London*.

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*Pray let your Answer be left at* Mr. Benjamin Billingsley's, *a Bookseller, at the Sign of the* Printing Press *on the South-west Walk of the* Royal Exchange.